IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NO. 80

JOSEPH SHERMAN, *Petitioner,*

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE IN SUPPORT OF THE DISSENTING JUDGES BELOW

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Amici Curiae

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The undersigned hereby move for leave to file the attached brief in support of the dissenting judges below.

INTEREST OF AMICI CURIAE

Our interest in this case relates to law reform. We represent no clients. Regarding law reform and its relevance to this case, we have individually and, on occasion, together concerned ourselves with matters such as (1) judicially prescribed rules of fairness for administrative proceedings, (2) relations between courts and legislatures concerning law reform, (3) erosion of

the goals of the Administrative Procedure Act by those who ignore its plain words, (4) special problems of the long-time resident alien, and (5) the role of legal educators as amici curiae. See, *e.g.*, Newman, *The Process of Prescribing "Due Process,"* 49 CALIF. L. REV. 215 (1961), and *What Agencies Are Exempt from the Administrative Procedure Act?*, 36 NOTRE DAME LAWYER 320 (1961); Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L. J. 262 (1959), and *Review of Pocket Parts to Davis Administrative Law Treatise*, 54 CALIF. L. REV. 1392, 1405–1411 (1966); Newman and Surrey, ON LEGISLATION (1955) (particularly chap. 4: "Legislative-Administrative Relations").

Our study of this case has convinced us that certain questions have not been and will not adequately be presented by the parties; yet the answers to those questions could be dispositive of the issues here. For example, there appears to have been no reference by any participant attorney to §10(e) of the Administrative Procedure Act, 5 U.S.C. §1009(e), which clearly governs the scope of review here of all questions of law. Nor has §7(c) of that Act been mentioned, notwithstanding its demonstrable relevance to the interpretation of those words of the Immigration and Nationality Act that the parties' attorneys here have discussed. Nor has there been adequate exploration of due process questions that inevitably arise when the liberty of long-time residents is jeopardized. We believe that such questions are critically important and that, before reaching its decision, the Court should consider their impact.

IS THIS MOTION TIMELY PRESENTED?

We had expected to file this brief pursuant to Rule 42(2), "within the time allowed for the filing of the brief of the party supported." To our great shock we learned last month, however, while telephoning the Office of the Solicitor General, that the brief of the party our position supports already had been filed. That was surprising because on August 9, 1966, Mr. Gollobin, attorney for Petitioner, wrote to Mr. Hesse as follows: "The filing date for our brief on Sherman is on or about October

25th which I think will give you time for an amicus brief. Copy of cert petition is enclosed." Thus we erroneously had assumed that our deadline would be the last week in October rather than the last week in September.

Rule 42(3) requires only that our brief "timely be presented," and we hope that the explanation of our inability to proceed under Rule 42(2) will be considered sufficient. We airmailed typescript copies of the brief to the Solicitor General and to Petitioner's attorneys on the same day that our manuscript was given to the printer. Consent to its filing was obtained from Petitioner's counsel; consent of the Solicitor General was requested but refused.

• • •

Accordingly we request leave to file the attached brief.

October 11, 1966.

Respectfully submitted,

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The nature of the interest of amici curiae is stated in the attached motion (see page 3 above), and is incorporated herein.

SUMMARY OF ARGUMENT

I.

This case involves not only §106(a) and §242(b) of the Immigration and Nationality Act, which are discussed in Petitioner's Brief and in the Solicitor General's Brief in Opposition, but also §10(e) and §7(c) of the Administrative Procedure Act, which have not been discussed here or below.

II.

Under §10(e) of the Administrative Procedure Act one question to be decided is the exact meaning of that "burden of proving" which the Solicitor General has conceded was properly on the Government. Burden of proof must not be confused with quantum of proof; and in the Immigration and Nationality Act there is no prescription concerning burden, though Congress did prescribe concerning quantum.

III.

To require more than a preponderance of evidence in this kind of case would not introduce confusion and uncertainty into deportation law. "This kind of case" can be defined, and immigration officials have had long experience in applying variant burdens of proof. In this case the deciding officials may well have been confused about what burden of proof means.

IV.

There are compelling reasons why more than a preponderance of evidence should be required. Since petitioner received no such protection the agency's findings, under §10(e) of the Administrative Procedure Act, must be set aside because they are "without observance of procedure required by law."

V.

Section 10(e)(B)(1) of the Administrative Procedure Act requires that the agency action be set aside because it was arbitrary, capricious, and an abuse of discretion.

ARGUMENT

I. This case involves §10(e) and §7(c) of the Administrative Procedure Act, which have not yet been discussed either here or below.

Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009, applies here except for subdivisions (5) and (6) of paragraph (e).[1] See §12 of the Act, 5 U.S.C. §1011. In pertinent part §10 reads as follows:

[1] Subdivision (6) affects only trials de novo. Subdivision (5), requiring courts to set aside "findings . . . unsupported by substantial evidence," is supplanted here by §106(a)(4) of the Immigration and Nationality Act, which requires that supporting evidence be not only "substantial" but also "reasonable . . . and probative."

> Section 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> • • •
>
> (e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

It is clear that no "statutes preclude judicial review" and that expulsion of aliens is not "committed to agency discretion" within the meaning of the introductory clause of that section. Indeed, though §106 of the Immigration and Nationality Act *first*, prescribed the form of action for review, and *second*, modified APA §10 in other ways (*e.g.*, by requiring "reasonable . . . and probative" as well as "substantial" evidence), it is clear that Congress did not intend to supersede the bulk of §10(e). See H.R. REP. 1086, p. 22 (1961) ("the bill implements and applies section 10 of the Administrative Procedure Act"). The

first sentence of §106 states that the Review Act of 1950, 5 U.S.C. §§1031–1042, is "the sole and exclusive procedure for . . . judicial review of all final orders of deportation. . . ." Other agencies subject to the Review Act are, of course, also subject to §10(e) of the Administrative Procedure Act.

These words of §7(c) of the Administrative Procedure Act, 5 U.S.C. §1006(c), are significant because they illumine §106 (a)(4) and §242(b)(4) of the Immigration and Nationality Act (see II,B below):

> Except as statutes otherwise provide, the proponent of a rule or order shall have the *burden of proof*. Any oral or documentary evidence may be received, but . . . no sanction shall be imposed or rule or order be issued except upon consideration of the whole record . . . and as supported by and in accordance with the *reliable, probative, and substantial* evidence.—5 U.S.C. §1006(c) (italics added).

II. Under APA §10(e) one question to be decided is the exact meaning of that "burden of proving" which the Solicitor General has conceded was properly on the Government. (Brief in Opposition to Petition for Certiorari, p. 6, n. 5)

A. *Burden of proof is not quantum of proof.*

We respectfully submit that the Solicitor General has muddled, analytically, the concept *quantum of proof* and the concept *burden of proof*. Cf. *id.* p. 5, where he equates "quantum of proof" and "standard of proof."[2] When in accordance with the Immigration and Nationality Act a court of appeal, under §106, or the Board of Immigration Appeals, or the special inquiry officer, under §242, looks for "reasonable, substantial,

[2] This muddling of two concepts, which also characterizes Judge Friendly's opinion below, is supported by neither of the leading treatises. See Davis, ADMINISTRATIVE LAW TREATISE §§14.14, 29.02, and 29.06 (1958); Gordon and Rosenfield, IMMIGRATION LAW AND PROCEDURE §§5.9h, 5.10b, 8.12c (1959–66).

It should be noted also that this case does not deal with the mere burden of producing evidence; *i.e.*, "the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." New CALIFORNIA EVIDENCE CODE §110 (1965).

and probative evidence," the search is for evidence by which the "findings of fact . . . [are] supported" (§106) or on which the "decision of deportability . . . is based" (§242). The question whether findings are supported by adequate evidence and the question whether a decision is based on adequate evidence are both different from the question whether the trier of fact, when he weighed the evidence, applied the correct burden of proof.

Burden of proof deals with belief. It means the obligation "to establish by evidence a requisite *degree of belief* concernning a fact, in the mind of the trier of fact"; moreover, "burden of proof may require a party to . . . establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, . . . by proof beyond a reasonable doubt . . . [or] some other burden. . . ."[3] That is to say, the key phrases are "preponderance," "clear and convincing," "beyond a reasonable doubt," and the like. Phrases such as "reliable, substantial, and probative" belong in another frame of discourse; they are akin to quantum and quality, not to burden or belief. The following excerpt from *Chow Sing v. Brownell*, 235 F.2d 602, 604 (9th Cir. 1956), is instructive:

> Appellant's argument is based on a misconception of the meaning of proof by a preponderance of the evidence . . . as distinguished from proof by clear and convincing evidence or proof beyond a reasonable doubt. Despite the terms used to describe two of these standards, the burden of proof is not simply a matter of the *quantity or type* of evidence offered. More significant is the *degree of belief* required of the trier of fact to make a finding.
>
> When the District Judge stated that he was unable to determine from the evidence whether appellant was the child of the citizen alleged to be his father, he was not applying the "clear and convincing evi-

[3] Quoted from §115 and the accompanying legislative committee comment on the new CALIFORNIA EVIDENCE CODE (1965) (italics and first comma added).

dence" burden of proof. He was merely stating that he did not believe that it was more probable than not that this fact was true.

B. *In the Immigration and Nationality Act there is no prescription concerning burden of proof, though Congress did prescribe concerning quantum of proof.*

That Congress has recognized the distinction between burden and quantum is illustrated by APA §7(c), which reads as follows:

> Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. . . . [No] rule or order [shall] be issued except . . . as supported by and in accordance with the reliable, probative, and substantial evidence.

We note the remarkable similarity between "reliable, probative, and substantial," in this section, with "reasonable, substantial, and probative," in §§106 and 242 of the Immigration and Nationality Act. We observe that, notwithstanding the remarkable similarity (and evident borrowing), *Congress chose to say nothing about burden of proof in the Immigration and Nationality Act.* The textual proximity of the burden concept and the quantum concept in the APA was not enough to convince the draftsmen of the Immigration and Nationality Act and its 1961 amendments that, along with quantum, they should also deal with burden. See *Matter of V*, 7 I. & N. DEC. 460, 463 (1957) ("the act does not speak of the burden of proof").

Thus the immediately applicable statute prescribes nothing vis-à-vis burden. Does that mean there is no law regarding burden? Certainly not. The APA and the Immigration and Nationality Act and many other statutes deal extensively with administrative procedure; but many procedural rules—perhaps most—are the product of judicial lawmaking.

For decades, rules that govern burdens of proof in alien proceedings have been made by courts; and here the over-all doctrine is that the Government has the burden of proving deportability. See *Hughes v. Tropello*, 296 FED. 306, 309 (3d

Cir. 1924) ("due process"). In apparent recognition of that doctrine Congress has switched the burden from the Government to the individual in two special situations: see §241(a)(3) and (8) and §291 of the Immigration and Nationality Act. Further, in the 1961 amendments that included §106 of the Act and dealt with quantum only (see above), Congress indicated its awareness of rules that, in proceedings other than deportation, deal with degrees of belief (*e.g.*, "preponderance" compared with "clear, unequivocal, and convincing"). See §349(c) of the Act and H.R. REP. 1086, pp. 39–41 (1961). As yet, however, *Congress has taken no action whatsoever to guide or interfere with the judicial articulation of rules that deal with degrees of belief of the trier of fact concerning deportability.*

III. To require more than a preponderance of evidence would not introduce confusion and uncertainty into deportation law, as Judge Friendly seemed to fear.

In general, " 'burden of proof' refers to the burden of proving the fact in question by a preponderance of the evidence"; often, though, "a heavier or lesser burden is specially required in a particular case by constitutional, statutory, or decisional law." (The quotations are from the Assembly Judiciary Committee's comments on §115 of the new, 1965, CALIFORNIA EVIDENCE CODE.)

Judge Friendly stated below, "I fear that imposing a special judicially prescribed burden of persuasion on an ill-defined group of cases will introduce confusion and uncertainty into deportation law." 350 F.2d at 900. He then conceded, though, that "[i]f the slate were clean" (*i.e.*, if Congress seemingly had not intervened), perhaps "the standard of persuasion should be similar to that in denaturalization, where the Supreme Court has insisted that the evidence be 'clear, unequivocal, and convincing' and that the Government needs 'more than a bare preponderance of the evidence' to prevail." *Ibid.*

We have just shown (above) that, in fact, the slate is clean and that Congress has not intervened on this issue. No statutory words are applicable. We now suggest that to require the Gov-

ernment in this kind of case to produce more than a preponderance would not introduce confusion and uncertainty.

A. *"This kind of case" can be defined.*

Our contentions concern long-time residents, not aliens who only recently came to America. This Court has recognized that for many purposes those two kinds of people ought to be treated differently. See, *e.g., Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).[4] The borderlines are not of course merely temporal. "As with the doctrine of laches, there will enter into the mix the lapse of time, the character of the proof, and the severity of the consequences." Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914, 918 (1966). Specific questions will involve the remoteness of the alleged misconduct, the relation between the misconduct and inadmissibility at the time of entry (cf. Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L. J. 262, 290 (1959)), the relation between the misconduct and the concept "undesirable resident" (cf. Maslow, *Recasting our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 332 (1956)), the man's age when he began his permanent residence, his family situation, etc. These are the factors that make "high-burden" cases out of long-time-residence cases, and lawmen by no means are inexperienced in thus relating burdens of proof and degrees of damage to a man's liberty.

[4] We note Petitioner's suggestion that a higher burden of persuasion be imposed in all cases of expulsion of permanent resident aliens. *Brief for Petitioner*, p. 15. Such a rule would have the virtue of simplicity, and there are other considerations supporting it. Before an alien acquires the status of permanent resident he must survive two screenings, one by the consular service abroad, and another by the immigration service at the border. Both times he must, in effect, establish his right to enter beyond a reasonable doubt, since the Government asserts the right at either stage to reject his claim without giving any reason. It might be reasonable, therefore, to require the Government to establish its double error, or the alien's compounded fraud, by a higher burden of persuasion regardless of the length of residence. *Compare* Lee Hon Long v. Dulles, 261 F.2d 719 (9th Cir. 1958); Delmore v. Brownell, 236 F.2d 598 (3rd Cir. 1956) (imposing the burden of persuasion required for denaturalization when an alleged citizen established that the Service had accepted his claim). This reasoning is more compelling when the alien's roots here are evidenced by a citizen family.

B. *Immigration officials have had long experience in applying variant burdens of proof.*

Here are random excerpts that, in response to Judge Friendly, imply the question, Has the law been characterized by certainty and lack of confusion?

> [W]e are unable to say that appellant has proved beyond a reasonable doubt that he was entitled to remain in the United States.—*Moy Guey Lum v. United States*, 211 FED. 91, 95 (7th Cir. 1914), cert. den., 234 U.S. 756.
>
> The rule of proof in deportation proceedings is not proof beyond a reasonable doubt but such a hearing as will enable the alien to present his proof or evidence that he has not made himself a subject to deportation.—*In re Giacobbi*, 32 F. SUPP. 508, 517 (N.D. N.Y. 1939).
>
> [W]e think there was evidence from which a trier of fact could conclude that Sui was an alien. And it would pass as a preponderance, as clear, cogent and convincing, or as beyond a reasonable doubt.—*Wong Kwok Sui v. Boyd*, 285 F.2d 572, 575 (9th Cir. 1960).
>
> Not only has the Supreme Court never announced the "clear, unequivocal and convincing" rule for such a [deportation] proceeding, it has never announced that any court in reviewing such a decision can decide whether or not the mere burden of proof has been or has not been sustained. When some evidence supporting the decision has been found, the reviewing court's decision is definitely fixed.—*Bridges v. Wixon*, 144 F.2d 927, 938 (9th Cir. 1944) (Stephens, J. concurring).
>
> [I]n his [the hearing officer's] opinion plaintiff's testimony was not of such convincing character as to overcome his sworn statement. The issue of credibility is solely the function of the hearing officer and not reviewable by the court. . . . The decision of the

district court rests upon a record with *sustaining evidence of a substantial, convincing and compelling character*, therefore the order dismissing the petition for review is affirmed.—*Lattig v. Pilliod*, 289 F.2d 478, 480 (7th Cir. 1961) (italics added).

That the wrong burden of proof was applied was held in Mar Gong v. Brownell, 9 Cir., 209 F.2d 448, a decision before the instant decision of the Board of Immigration Appeals. We there held . . . that "no special quantum of proof should be exacted from any person claiming American citizenship merely because of his racial origin. . . . [T]he Board treated the hearing of the appeal as a trial de novo and reappraised the evidence adversely to appellant. Instead, it should have returned the case to the special inquiry officer who heard these witnesses for his appraisal of the evidence applying the ordinary burden of proof.—*Ng Yip Yee v. Barber*, 225 F.2d 707, 708 (9th Cir. 1955).

This Court has said that in a denaturalization case, "instituted . . . for the purpose of depriving one of the precious right of citizenship previously conferred we believe the facts and the law should be construed as far as is reasonably possible in favor of the citizen." *Schneiderman v. United States*, 320 U.S. 118, 122. . . . The same principle applies to expatriation cases, and it calls for placing upon the Government the burden of persuading the trier of fact by clear, convincing, and unequivocal evidence that the act showing renunciation of citizenship was voluntarily performed.—*Nishikawa v. Dulles*, 356 U.S. 129, 134 (1958).

C. *In this case the deciding officials may well have been confused about what is meant by burden of proof.*

The special inquiry officer appears to have asked himself, "Was there enough evidence?" Not, "How strongly should I believe before I decide?" Thus (R. 67), "The burden of establishing deportability by reasonable, substantial, and probative

evidence is on the Government. . . ." And (R. 70), "the Government has established with a solidarity far greater than required that respondent . . . reentered the United States December 20, 1938, claiming to be a citizen. . . ." Note that the word was "solidarity" (whatever that may mean) when it should have been persuasiveness (or, perhaps, "solidity"). Note too that "far greater than required" seems hyperbolic no matter which word is used.

"[W]e are not unmindful of the collateral discrepancies and contradictions uncovered during the extensive cross-examination . . . ," he said. "Those, however, which appear to be but the usual frailties of memory, create an aurora of credibility and reliability to the witness' testimony as a whole." (R. 71) That "aurora" [*sic*] scarcely aids our identifying the degree of the inquiry officer's belief.

That the Board of Immigration Appeals may have been aware of degrees of belief is shown by this statement:

> [I]t is established *beyond any reasonable doubt* that the respondent himself applied for the passport. . . .—(R. 78) (italics added).

Further, the Board said, "proof that the passport was used abroad raises a presumption that it was used by the person who applied for it and who is described by it." *Ibid.* That presumption, together with Morrow's testimony, was enough.

> Our conclusion that the respondent was outside the United States after his original entry in 1920, is not based upon his silence but upon uncontradicted proof that he was seen abroad, and his action in applying for a document which described him, which was meant to be used by one going abroad, and which was used abroad.—(R. 80)

What persuasive power had the "uncontradicted proof" thus mentioned? Hardly "beyond any reasonable doubt" or clear, unequivocal, and convincing. At best one observes the language of bare preponderance: "We find the witness credible and his testimony probative and substantial. . . . [T]hough not

close; . . . [a]ssociations connected with this period [1937–38] could well remain despite the passage of years [*i.e.*, 26 years]." (R. 77)

IV. There are compelling reasons why more than a preponderance of evidence should be required.

We urge that the Court pronounce, as either due process or a declared rule of decent procedure, the view that burdens of proof vary with the degrees of damage to an individual's liberty. That view produced "beyond a reasonable doubt" in criminal cases as well as "clear, unequivocal, and convincing" in citizenship cases; and law reform hardly should halt at those two boundaries. Especially when there is no persuasive evidence that Congress had a contrary intent, the standard for long-time residents in deportation cases should "be similar to that in denaturalization," as Judge Friendly implied.

Our contention here is not that the deportation of long-time residents should be labeled criminal punishment. Instead we suggest that the Court (1) again recognize the "doom" that such deportation entails (see below), and (2) articulate for governing officials the obvious relation of long-timeness, doom, and persuasiveness of evidence.

Reliable truth-determining is only partly ensured by dichotomies such as criminal-civil and criminal-administrative. Should the lack of criminal punishment automatically lead us to deny all those criminal-procedure guarantees that can be withheld in "the typical civil trial?" Certainly not. Cf. *Schneiderman v. United States*, 320 U.S. 118, 160 (1943) ("A denaturalization suit is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status."); *Bean v. Barber*, 163 F. Supp. 111 (N.D. Calif. 1958) (Government can hardly avoid the clear, unequivocal, and convincing rule when its action is "equivalent to" expatriation); and see *United States v. Murff*, 170 F. Supp. 182, 185 (S.D. N.Y. 1959), suggesting that, in deportation cases, evidence to prove a marriage invalid should be "strong, distinct, satisfactory, and conclusive."[5]

[5] The reasons that led Congress in §349(c) of the Act to modify Gonzales

Procedural guarantees are constructed to aid the pursuit of truth. They are not prefabricated scaffoldings, used only when a case fits the blueprints we label "criminal," "naturalization," "discretionary relief," etc.[6]

A. *The problem of staleness.*

In this case the cross-examination of Edward Morrow exposed, dramatically, the quirks of men's memories. See R. 21–39 and 49–62.[7] When government orders that brutally uproot United States residents must be based on that kind of testimony, should it not constitute convincing not merely preponderant evidence? Identifications induced by prosecution-sponsored peep-holing, on the day that the testimony is to be heard (R. 60 and 76), are presumptively suspect when faces and events to be recalled are more-than-a-quarter century dimmed. Even without that dimming, misidentification is one of the prime contributors to miscarriage of justice. See Borchard, CONVICTING THE INNOCENT 367 (1932); cf. *Wade v. United States*, 358 F.2d 557 (5th Cir. 1966).

"If the Government is to turn the clock back after all these years, it should meet a standard of proof which is not meagre." *Lee Hon Lung v. Dulles*, 261 F.2d 719, 724 (9th Cir. 1958). Evidence to prove that an illegal entry was made 26 years ago by a man who, even then, had resided here for 18 years inevitably is doubtful evidence. Patently, when the Government to

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v. Landon, 350 U.S. 920 (1955) and Nishikawa v. Dulles, 356 U.S. 129 (1958) do not fit our case. See H.R. REP. 1086, pp. 40–41 (1961); cf. Justice Brennan's opinion in Kimm v. Rosenberg, 363 U.S. 405, 412 n.2 (1960).

[6] Cf. Newman, *The Process of Prescribing "Due Process,"* 49 CALIF. L. REV. 215, 219 (1961); Gonzalez-Jasso v. Rogers, 264 F.2d 584, 587 (D.C. Cir. 1959): "If uncorroborated admissions are insufficient to convict a man of a crime, they should hardly suffice to deprive him of citizenship. . . ."

[7] Strangely, the SS Aquitania was the ship to France that during June 1937 took from New York not only the man named Samuel Levine, alleged to be Petitioner here, but also a man named Frank C. Newman, co-author of this brief. To project into the 1960's the latter's recollections of his shipmates would be illuminating, speculatively.

demonstrate that such acts, in truth, did occur must rely on recollections so aged, it should meet a standard which is not meagre.

Arguing in the court below, the United States Attorney suggested that "The remoteness of the entry in this case [*i.e.*, in 1938] does not significantly affect the problem of proof, except to impose investigative difficulties on the Service in reaching back to establish the facts." Petition for Rehearing, p. 5. *Those "investigative difficulties" are exactly what we stress.* When the investigators do reach back that many years, the law fairly requires the Service to consider not only the bulk but also the persuasiveness of testimony that so inherently has been difficult to discover.

For purposes of this case we concede that the staleness of the charge did not violate any statute of limitations. Cf. the minority opinion below, 350 F.2d at 895, n. 1. The legislative decision not to intrude with a statute does not mean, though, that administrators and judges therefore should ignore all problems that staleness creates. The doctrine of laches that courts developed proves that. Cf. Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914, 918 (1966).

Nearly one hundred years ago this Court commented on ". . . the general experience of mankind, that claims which are valid are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity . . . . This presumption is made by these statutes [of limitations] a positive bar; and they thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and *the imperfect recollection of others*, or the destruction of documents, it might be impossible to establish the truth. . . ." *Riddlesbarger v. Hartford Ins. Co.*, 7 WALL. 386, 390 (1869) (italics added).

Long-time residents may need no statute of limitations or laches doctrine. But to impose a higher burden of persuasion, thus moderately protecting those residents from "the imperfect recollection of others," surely would be a contribution to de-

cency. Individuals, unlike bureaucracies, typically do not keep records over the decades to refresh their recollection.

B. *The "doom" that awaits Petitioner.*

A citizen can vote and enjoys an unconditional right to return if he leaves the country. Otherwise, at least in time of peace, there is little affirmatively to distinguish citizen from permanent resident alien. The essence of either status is the right to remain. This Court has repeatedly recognized the crucial value of continued residence to an alien who has become rooted here.[8] Equally vital is his citizen family's right to continued love, support, companionship and other precious, however intangible, human associations. These are matters that should not be ignored when prescribing the procedural prerequisites to the power asserted here. Compare *Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953); *Rowoldt v. Perfetto*, 355 U.S. 115 (1957).[9]

C. *The penal nature of expulsion in this case.*

What is the power asserted here? Its evolution makes clear that today expulsion is more a police than a regulatory power.

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[8] *E.g.*, Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (Brandeis, J.); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (Douglas, J.); Costello v. INS, 376 U.S. 120, 128 (1964) (Stewart, J.). See also United States *ex rel.* Eichenlaub v. Shaughnessy, 338 U.S. 521, 533–34 (1950) (Frankfurter, J. dissenting) (coining the phrase "doom of deportation"); Jordan v. DeGeorge, 341 U.S. 223, 243 (1951) (Jackson, J. dissenting) (characterizing deportations as a "savage penalty"). See also *Appendix to Brief for Petitioner*, Rowoldt v. Perfetto, 355 U.S. 115 (1957).

[9] Both the majority below (350 F.2d at 900 n.1) and the Government here (*Brief in Opposition*, p. 2) noted the discretionary authority for suspension of deportation. This fact is apparently deemed relevant on the theory that it blunts much of the horror of expulsion of rooted residents. But assuming petitioner did not enter unscreened in 1938, in order to avail himself of such relief he would be required to commit perjury; and, assuming he did so enter, there is no assurance that the Attorney General will dispense the relief. See Jay v. Boyd, 351 U.S. 345 (1956). To prescribe the burden of persuasion of the Government on the basis whether an alien is or is not willing to seek discretionary relief would amount to shifting the burden of proof to the alien, making him prove his right to remain. *Compare* Griffin v. California, 380 U.S. 609 (1965), *with* Kimm v Rosenberg, 363 U.S. 405 (1960).

Expulsion was first prescribed because of the need, after hurried screening of masses of aliens continuously arriving unannounced, to make entry conditional long enough for administrative correction of erroneous decisions made at the border. *Ekiu v. United States*, 142 U.S. 651, 659 (1892); *Fong Yue Ting v. United States*, 149 U.S. 698, 713–14 (1893); *Pearson v. Williams*, 202 U.S. 281, 284 (1906). The power was extended by congressional prescription of conclusive presumptions of inadmissibility on proof of undesirable conduct after entry that indicated an initial disqualification to enter. Such presumptions should be tested like other conclusive presumptions. Compare *Keller v. United States*, 213 U.S. 138, 149–50 (1909) (Holmes, J. dissenting),[10] with *Tot v. United States*, 319 U.S. 463, 467–68 (1943).

Yet, since 1917, Congress has asserted wholesale power to expel resident aliens regardless of the relation between proscribed resident conduct and initial qualification to enter. Hesse, *The Constitutional Status of The Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L. J. 262 (1959). It is thus no longer possible to assert, as Justice Holmes did for the Court in *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913), that "the coincidence of local penal law with the policy of Congress is an accident." On the contrary, §§241 and 242 of the Immigration and Nationality Act read far more like a penal code than a statute purporting to regulate immigration.[11] As early as 1940, a Service official confessed: "We are now an emigration service, whereas we were formally an immigration service."[12]

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[10] Justice Holmes disagreed with the majority over what was necessary and proper for the regulation of immigration, not about the nature of the power itself. See Looe Shee v. North, 170 FED. 586, 571 (9th Cir. 1909).

[11] For details, see, e.g., Hesse, *The Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L. J., 262–65, 270–71 (1959); Comment, *Deportation and Exclusion: A Continuing Dialogue Between Congress and the Courts*, 71 YALE L. J. 760, 789 n. 143 (1962). See also, Maslow, *Recasting Our Deportation Law: Proposals for Reform*, 56 COLUM. L. REV. 309, 314–17 (1956).

[12] Secretary of Labor's Committee on Administrative Procedure, THE IMMIGRATION AND NATURALIZATION SERVICE 10 (1940). Almost simultaneously, in 1940, Congress appropriately transferred responsibility for

We suggest, therefore, that for purposes of the burden of persuasion imposed on the Government, Petitioner be equated either with a naturalized citizen—compare *Schneiderman v. United States*, 320 U.S. 118, 123 (1943)—or with those resident aliens whose present undesirability is proved by conviction of criminal conduct—see Point V (below). And since more than a preponderance of evidence should have been but was not required, under APA §10(e) the agency's findings must be set aside because they are "without observance of procedure required by law."

V. APA §10(e)(B)(1) requires that the agency action be set aside because it was "arbitrary, capricious, [and] an abuse of discretion."

The action here was arbitrary and capricious because of the built-in discrimination against non-criminal residents. Once their period of residence has passed five years, most aliens are deportable only when they have been convicted of a crime and thus have had the full benefit of "beyond a reasonable doubt" and other Anglo-American protections. Petitioner in this case is among the small class whose alleged misconduct long ago involves not proved crime but questioned entry or re-entry, proscribed political activities, immorality, etc. See §241(a) of the Immigration and Nationality Act. To discriminate procedurally in favor of the proved criminal, by giving the non-criminal less protection, scarcely seems fitting. Cf. *Baxtrom v. Herold*, 383 U.S. 107 (1966).

What should be said regarding the exercise of the agency's discretion here? That discretion, a directive by Congress, can be characterized as follows: Regardless of lapse of time and length of residency, seek out and expel those aliens who have committed misdeeds and thus seem undesirable. Did Congress intend that such discretion be errant and limitless? Hardly. See Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965). Was it not abused in a case where the sole charge against a man, 43 years resident, was that 25 years ago "you entered the United States without inspection?"

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enforcement of its immigration policies from the Labor Department to the Justice Department. See SEN. REP. 1515, pp. 290–91 (1950).

(R. 1) Why should that single datum, now, permit any rational bureaucracy to banish such a man to Poland, a country he knew only as a 14-year-old boy, 46 years ago? Especially when the sole testimony showing that he may have left and then returned to the United States is as shaky as was Edward Morrow's testimony here, we submit that abuse of the discretion Congress conferred is clearly shown. Accordingly, the agency's findings must be set aside under APA §10(e)(B)(1).

CONCLUSION

Judges Waterman and Smith in their dissenting opinion below demonstrated that our legal system can both respond humanely to the interests of the alien faced with exile and at the same time ensure a sound, fair administration of our expulsion laws. Whatever may be the Court's decision in this case, for the foregoing reasons we urge that in reaching its decision it adopt the approach of the dissenting judges below.

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